



DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 10, 12, 13, 18, and 26

[FAC 2019-02; FAR Case 2017-009; Item I; Docket No. 2017-0009, Sequence No. 1]

RIN 9000-AN45

Federal Acquisition Regulation: Special Emergency

Procurement Authority

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement sections of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2017 to expand special emergency procurement authorities for acquisitions of supplies or services that facilitate defense against or recovery from cyber attack, provide international disaster assistance under the Foreign Assistance Act of 1961, or support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

DATES: Effective Date: [Insert date 30 days after date of publication in the FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Camara Francis, Procurement Analyst, at 202-550-0935, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division at 202-501-4755. Please cite FAC 2019-02, FAR Case 2017-009.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published a proposed rule in the Federal Register at 83 FR 29736 on June 26, 2018, to implement sections 816 and 1641 of the NDAA for FY 2017 (Pub. L. 114-328). Sections 816 and 1641 modify 41 U.S.C. 1903, Special Emergency Procurement Authority. The revisions to 41 U.S.C. 1903 establish special emergency procurement authorities to allow for higher micro-purchase threshold (MPT) and simplified acquisition threshold (SAT) for acquisitions of supplies or services that facilitate defense against or recovery from cyber attack; support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or support responses to

an emergency or major disaster (42 U.S.C. 5122), except that this new authority allows treatment of acquisitions, for property or a service, as a commercial item only for acquisitions to facilitate the defense against or recovery from a cyber attack against the United States.

II. Discussion and Analysis

No public comments were submitted in response to the proposed rule. Therefore, there are no changes made to the final rule.

III. Expected Impact of the Final Rule and Proposed Cost Savings

Prior to enactment of the NDAA for FY 2017, for acquisitions of supplies or services that are to be used to support a contingency operation, or to facilitate defense against or recovery from nuclear, biological, chemical, or radiological attack, agencies had the authority, as provided in FAR part 13, to utilize the higher MPT of \$20,000 in lieu of \$3,500 in the case of any contract to be awarded and performed, or purchase to be made, inside the United States; and \$30,000 in the case of any contract to be awarded and performed, or purchase to be made, outside the United States (except for acquisitions of construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate requirements (Construction)). Additionally, prior to the

enactment of the NDAA for FY 2017, agencies had the authority, as provided in FAR part 13, to utilize the higher SAT of \$750,000 in lieu of \$150,000 for any contract to be awarded and performed, or purchase to be made, inside the United States; and \$1.5 million for any contract to be awarded and performed, or purchase to be made, outside the United States; and utilize the higher threshold of \$13 million in lieu of \$7 million for use of simplified acquisition procedures (SAP) for the acquisition of commercial items (including acquisitions treated as acquisitions of commercial items to facilitate defense against or recovery from nuclear, biological, chemical or radiological attack).

This final rule expands the use of the special emergency procurement authorities to apply to acquisitions of supplies or services that facilitate defense against or recovery from a cyber attack; support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or support a response to an emergency or major disaster (42 U.S.C. 5122).

This rule will impact all businesses that submit offers in response to Federal solicitations for supplies or

services covered by the expanded special emergency procurement authorities. Acquisitions with an estimated value between the MPT or SAT and the higher thresholds for the expanded special emergency procurement authorities will use simplified procedures, thereby reducing the requirements imposed on the offerors when responding to the solicitation.

DoD, GSA, and NASA have performed a regulatory cost analysis on this final rule. The following is a summary of the estimated public cost savings calculated in 2016 dollars at a 7-percent discount rate and in perpetuity:

SUMMARY	Public	Government	Total
Present Value	-\$18,969,086	-\$3,342,671	-\$22,311,757
Annualized Costs	-\$1,327,836	-\$233,987	-\$1,561,823
Annualized Value Costs (as of 2016 if Year 1 is 2019)	-\$1,083,909	-\$191,003	-\$1,274,912

To access the full regulatory cost analysis for this rule, go to the Federal eRulemaking Portal at www.regulations.gov, search for "FAR Case 2017-009," click "Open Docket," and view "Supporting Documents."

IV. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule does not add any new solicitation provisions or clauses, or impact any existing provisions or contract clauses.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

VI. Executive Order 13771

This final rule is considered to be an E.O. 13771 deregulatory action. The total annualized value of the cost savings is -\$1,274,912 (as of 2016 if Year 1 is 2019). Details on the estimated cost savings can be found in Section III of this preamble.

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

This final rule implements sections 816 and 1641 of the NDAA for FY 2017 (Pub. L. 114-328), which amend 41 U.S.C. 1903.

The objective of this rule is to expand special emergency procurement authorities for acquisitions of supplies or services that—

- Facilitate defense against or recovery from cyber attack;
- Provide international disaster assistance under the Foreign Assistance Act of 1961; or
- Support response to an emergency or major disaster under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.

There were no public comments. The requirements in the rule are not expected to have a significant economic impact on a substantial number of small entities because the rule merely expands existing flexibilities associated with contracting under the SAT to include defense against or recovery from cyber attacks, international disaster assistance, and response to emergencies or major disasters, in which a smaller percentage of small entities participate, as compared to other than small entities. Based on an average of contract actions reported in the Federal Procurement Data System data for fiscal years 2014 – 2016, this rule applies to less than 100 small entities that submit offers in response to solicitations for the acquisition of supplies or services—

- Between \$150,000 and \$750,000 to facilitate defense against or recovery from cyber attacks.
- Between \$3,500 and \$30,000 or between \$150,000 and \$1.5 million, to provide international disaster assistance under the Foreign Assistance Act of 1961; and
- Between \$3,500 and \$20,000 or between \$150,000 and \$750,000, to support response to emergencies or major disasters in the U.S.;

This rule reduces compliance requirements on small entities, resulting in estimated savings to affected small entities of approximately \$650,330 in the first year.

The rule contains no reporting, recordkeeping, or other compliance requirements on the vendor community.

DoD, GSA, and NASA have not identified any significant alternatives consistent with the statute that would further reduce impact on small entities.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

VIII. Paperwork Reduction Act

This final rule does not contain any information collection requirements that would require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 2, 10, 12, 13, 18, and 26

Government procurement.

Dated: March 19, 2019.

William F. Clark,
Director,
Office of Government-wide
Acquisition Policy,
Office of Acquisition Policy,
Office of Government-wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 10, 12, 13, 18, and 26 as set forth below:

1. The authority citation for 48 CFR parts 2, 10, 12, 13, 18, and 26 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b) (2) by—

a. Adding in alphabetical order the definitions “Emergency” and “Major disaster”;

b. Revising paragraph (3) introductory text of the definition “Micro-purchase threshold”; and

c. Revising paragraph (1) introductory text of the definition “Simplified acquisition threshold”.

The additions and revisions read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Emergency, as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203, and subpart 26.2, means any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect

property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States (42 U.S.C. 5122).

* * * * *

Major disaster, as used in 6.208, 13.201, 13.500, 18.001, 18.202, 18.203, and subpart 26.2, means any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President, causes damage of sufficient severity and magnitude to warrant major disaster assistance under the Stafford Act to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby (42 U.S.C. 5122).

* * * * *

Micro-purchase threshold * * *

(3) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological,

chemical or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or to support response to an emergency or major disaster (42 U.S.C. 5122), as described in 13.201(g)(1), except for construction subject to 40 U.S.C. chapter 31, subchapter IV, Wage Rate Requirements (Construction) (41 U.S.C. 1903)–

* * * * *

Simplified acquisition threshold * * *

(1) Acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or to support response to an emergency or major disaster (42 U.S.C. 5122), (41 U.S.C. 1903), the term means–

* * * * *

PART 10–MARKET RESEARCH

10.001 [Amended]

3. Amend section 10.001 by removing from paragraph (a) (2) (vi) (A) "recovery from" and adding "recovery from cyber," in its place.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

12.102 [Amended]

4. Amend section 12.102 by removing from paragraph (f) (1) "recovery from" and adding "recovery from cyber," in its place.

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

5. Amend section 13.201 by revising paragraphs (g) (1) introductory text and (g) (2) to read as follows:

13.201 General.

* * * * *

(g) (1) For acquisitions of supplies or services that, as determined by the head of the agency, are to be used to support a contingency operation; to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance pursuant to 22 U.S.C. 2292 et seq.; or to support response to an

emergency or major disaster (42 U.S.C. 5122), the micro-purchase threshold is-

* * * * *

(2) Purchases using this authority must have a clear and direct relationship to the support of a contingency operation; or the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; international disaster assistance; or an emergency or major disaster.

* * * * *

6. Amend section 13.500 by revising paragraph (c) (1) to read as follows:

13.500 General.

* * * * *

(c) * * *

(1) The acquisition is for commercial items that, as determined by the head of the agency, are to be used in support of a contingency operation; to facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to support a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate provision of international disaster assistance;

or to support response to an emergency or major disaster,
or

* * * * *

PART 18—EMERGENCY ACQUISITIONS

7. Amend section 18.001 by—

- a. Revising paragraph (b);
- b. Redesignating paragraph (c) as paragraph (d);

and

- c. Adding a new paragraph (c).

The revision and addition read as follows:

18.001 Definition.

* * * * *

(b) To facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack against the United States;

(c) In support of a request from the Secretary of State or the Administrator of the United States Agency for International Development to facilitate the provision of international disaster assistance; or

* * * * *

8. Revise section 18.202 to read as follows:

18.202 Defense or recovery from certain events.

(a) Micro-purchase threshold. The threshold increases when the head of the agency determines the

supplies or services are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 2.101.)

(b) Simplified acquisition threshold. The threshold increases when the head of the agency determines the supplies or services are to be used to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 2.101.)

(c) Treating certain items as commercial. Contracting officers may treat any acquisition of supplies or services as an acquisition of commercial items if the head of the agency determines the acquisition is to be used to facilitate the defense against or recovery from cyber, nuclear, biological, chemical, or radiological attack. (See 12.102(f)(1) and 13.500(c)(2).)

(d) Simplified procedures for certain commercial items. The threshold limits authorized for use of this authority may be increased when it is determined the acquisition is to facilitate defense against or recovery from cyber, nuclear, biological, chemical, or radiological

attack; to facilitate provision of international disaster assistance; or to support response to an emergency or major disaster. (See 13.500(c).)

PART 26—OTHER SOCIOECONOMIC PROGRAMS

9. Revise the heading for subpart 26.2 to read as follows:

Subpart 26.2—Major Disaster or Emergency Assistance

Activities

* * * * *

10. Amend section 26.202 by designating the undesignated paragraph as paragraph (a) and adding paragraph (b) to read as follows:

26.202 Local area preference.

* * * * *

(b) When using the authority under the Stafford Act, see the definitions of “micro-purchase threshold” and “simplified acquisition threshold” in 2.101 for the authority to use an increased micro-purchase threshold and simplified acquisition threshold.

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